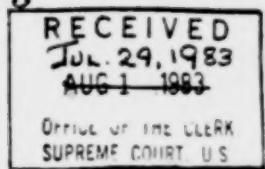


NO. **83 5183**



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES WILLIAM DAVIS,
Petitioner,

-v-

STATE OF OKLAHOMA,
Respondent.

WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTIORARI

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I.
QUESTIONS PRESENTED

1. Can a state consistent with the Sixth Amendment right to effective assistance of counsel, the Eighth Amendment right to individualized sentencing in capital cases, and the Fourteenth Amendment rights to due process and equal protection of the law fail to provide an opportunity for an indigent to obtain expert psychiatric testimony dealing with mitigation of punishment?
2. Can the Oklahoma Court of Criminal Appeals continually circumvent this Court's Opinion in Witherspoon v. Illinois, 391 U.S. 510 by excusing jurors for cause because the death penalty affects their conscience?
3. Can an appeals court consistent with the Eighth and Fourteenth Amendments and consistent with this Court's Opinion in Godfrey v. Georgia, 446 U.S. 420 (1980) allow for an open ended interpretation of the aggravating circumstance "cruel, heinous and atrocious" and fail to narrow the class of persons eligible for the death penalty as a result of their interpretation?
4. Is a state appeals court required by the Eighth and Fourteenth Amendments to undertake proportionality review of death cases by comparing Petitioner's sentence of death to similar cases and can a state appeals court consistent with the due process clause of the Fourteenth Amendment arbitrarily deny Petitioner his state statutory right to have a reference made to similar cases in determining to affirm a death penalty?

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NO.
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-17-

STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered in this case on May 9, 1983.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was published and will soon be produced in Pacific Reporter Series. It is annexed as Appendix A. The order denying rehearing is unreported. It is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on May 9, 1983. A timely petition for rehearing (Appendix C), was denied on June 17, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. §1257[3].

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED IN THIS CASE

This case involves the Fourteenth Amendment to the Constitution of the United States which provides, in relevant part:

"...Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed...; and to have the assistance of counsel for his defence."

The Eighth Amendment to the Constitution to the United States which provides, in relevant part:

"Excessive bail shall not be required,... nor cruel and unusual punishments inflicted."

This case also involves provisions of the Oklahoma Statutes.

1. O.S. 21 §701.7 Murder in the first degree.

A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

2. O.S. 21 §701.9 Punishment for murder.

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

3. O.S. 21 §701.10 Sentencing proceeding--Murder in the first degree

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

4. O.S. 21 §701.11 Instructions - Jury findings of aggravating circumstance.

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.

5. 21 O.S. §701.12 Aggravating circumstances

Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty. Laws 1976, 1st Ex.Sess., c.1, §6, eff. July 24, 1976. Laws 1981, c. 147 §1, eff. May 8, 1981.

6. O.S. 21 §701.13 Death Penalty - Review of sentence

A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and
3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or
2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

7. 22 O.S. (1971) §1171 Doubt as to present sanity prior to calling of indictment or information for trial or preliminary hearing.

If any person is held in confinement because of criminal charges, or if he has criminal charges pending or likely to be filed against him, or if he has been taken into custody because of a criminal act or acts, and prior to the calling of an indictment or information for trial or preliminary hearing, a doubt arises as to his present sanity, either such individual or the district attorney may make application to the District Court for an order committing such individual to a state hospital within the Department of Mental Health for observation and examination for a period not to exceed sixty (60) days. Provided, however, where an adequate examination can be had in the county where the charge is

pending, such examination shall be held in such county. Provided, however, the court may extend the sixty-day period where a need for such extension is shown. Any criminal proceedings against such individual shall be suspended pending the hearing of the application by the District Court. Laws 1963, c. 184, §1; Laws 1969, c. 288, §1. Emerg. eff. April 25, 1969.

8. 22 O.S. §1175.2 Application for determination of competency--Service--Notice--Suspension of criminal proceedings

A. No person shall be subject to any criminal procedures after he is determined to be incompetent except as provided in this act. The question of the incompetency of a person may be raised by the person, the defense attorney, or the district attorney, by an application for determination of competency. The application for determination of competency shall allege that the person is incompetent to undergo further proceedings, and shall state facts sufficient to raise a doubt as to the competency of the person. The court may, at any time, initiate a competency determination on its own motion, without an application, if the court has a doubt as to the competency of the person.

STATEMENT OF THE CASE

The petitioner, CHARLES WILLIAM DAVIS, was convicted of murder in the first degree 21 O.S. §701.7 for the murder of Robert Wayne Jones, petitioner's brother-in-law, and Dennis McLaughlin, a friend of petitioner's brother-in-law. Wounded but not killed in the same incident were Kathy Jones-Davis, petitioner's wife and Henry Jones, petitioner's brother-in-law.

THE EVIDENCE AT TRIAL

The evidence at trial showed petitioner on the night of the homicide, was married to Kathy Jones-Davis. R 1* (Tr. 337) In the early morning hours of August 13, 1977, Ms. Davis, accompanied by Dennis McLaughlin, a friend, and Robert and Henry Jones, her brothers, had driven down to Oklahoma City from Sapulpa, Oklahoma. (Tr. 339) These people arrived in Oklahoma City between 5:00 and 5:30 a.m. and went to the police station. (Tr. 340). Shortly thereafter, these people arrived at Petitioner's home. (Tr. 341). After loading Ms. Davis' belongings into the car, she, McLaughlin and her brothers re-entered the apartment to make sure everything was taken out. (Tr. 343) Thereafter, after asking where his car was, the Petitioner started shooting. (Tr. 348)

Ms. Davis admitted at trial she had had an agreement between herself and petitioner she would collect her belongings between 11:00 a.m. and 2:00 p.m. Saturday or Sunday. (Tr. 387) Henry Jones admitted initially when the people went in the house prior to leaving for one last look around, petitioner was outside with Henry Jones. (Tr. 532) The witness stated once they went inside petitioner's home for the last time, they were just standing around. (Tr. 535) After the shooting

*The record in the Oklahoma Court of Criminal Appeals consists of a bound record consisting of instruments filed in the trial court (hereinafter referred to as R.) and a trial transcript (hereinafter referred to as Tr.)

and after he regained consciousness, Henry Jones chased the Petitioner around the back of the house. (Tr. 538). He further claimed he did not have a gun when he chased the Petitioner even though he knew the Petitioner had a gun. (Tr. 538).

The petitioner basically testified to similar facts only he claimed he acted in self-defense.

The voir dire examination of jurors Metivier and Musgrave as shown by the Court of Criminal Appeals' Opinion is found at Appendix D to this Petition.

HOW THE FEDERAL QUESTIONS WERE
RAISED AND DECIDED BELOW

1. Prior to trial, petitioner requested through counsel, funds to hire certain witnesses to present evidence in mitigation of punishment. (R. 14-16). This motion was overruled by the trial court though the court did rule that if possible, the state psychiatrist should examine the defendant to determine whether there were mitigating factors. An attempt was made to have the person examined by the state hospital but the state hospital refused through their legal counsel who concluded that the hospital was without authority to check the defendant regarding mitigating factors. (Tr. Motions p. 10).

On appeal to the Oklahoma Court of Criminal Appeals, the court held there was no right to state funds to hire a psychiatrist to present mitigating factors on behalf of a defendant. While it is unclear from the consensus of the court's Opinion what the exact basis was for the denial of funds for expert witnesses, it is clear that the court considered this on due process principles, equal protection principles, opportunity to present mitigational evidence and the right to effective assistance of counsel from the brief discussion by the court of this issue and the brief of petitioner. Similarly, petitioner's petition for rehearing in the Oklahoma Court of Criminal Appeals specifically stating the exact constitutional amendments that he based his argument.

2. The objection to the improper excusal of Jurors Musgrave and Metivier was first made before the trial court and was briefed and addressed by the Oklahoma Court of Criminal Appeals. This issue was also addressed by the dissenting judge.

3. This aggravating circumstance was objected to prior to trial pursuant to defendant's motion to strike the bill of particulars. It was renewed at trial based on the fact the evidence did not support the finding that the murder was especially heinous, atrocious and cruel. This was overruled by the trial judge. On appeal to the Court of Criminal Appeals, petitioner's brief alleged the evidence presented by the prosecution was insufficient to support the aggravating circumstance "cruel, heinous and atrocious." Petitioner's brief was filed prior to this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980). Petitioner addressed in his petition for rehearing the improper interpretation placed on this aggravating circumstance in light of the Eighth and Fourteenth Amendments and in light of this Court's decision in Godfrey v. Georgia, supra.

4. Petitioner's last issue was briefed for the first time on rehearing. After the affirmance of petitioner's sentence in light of proportionality review previously conducted by the Oklahoma Court of Criminal Appeals and its refusal to conduct the same type of proportionality review in petitioner's case,

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER IT IS CONSISTENT WITH THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, THE EIGHTH AMENDMENT RIGHT TO INDIVIDUALIZED SENTENCING IN CAPITAL CASES, AND THE FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, TO PROHIBIT, IN A CAPITAL CASE, AN INDIGENT DEFENDANT'S RIGHT TO PROCURE SOME TYPE OF PSYCHOLOGICAL TESTIMONY REGARDING MITIGATION BY PROHIBITING HIM FUNDS FOR ANY TYPE OF TESTIMONY OR EXAMINATION AND PROHIBITING HIM FROM BEING EXAMINED IN THE STATE HOSPITAL TO DETERMINE MITIGATING FACTORS.

Prior to trial, Petitioner requested through counsel, funds to hire certain witnesses to present evidence in mitigation of punishment. Included in Petitioner's request for funds were funds for an expert psychiatrist who could testify to certain mitigating factors about Petitioner and the facts of the underlying crime. This request was overruled, not on the basis this evidence would be improper or would not be relevant but because of established Oklahoma precedent which holds that state trial judges are without authority under Oklahoma law to comply with a request for such funds because no funds are authorized for these purposes.

The Oklahoma statutory system fails to provide for expert witnesses of any kind even in the discretion of the trial court and the state hospital can only make a determination whether the defendant is competent to aid and assist his lawyer in presenting a defense. O.S. [1971] §1171. /2

It is petitioner's contention that his constitutional rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the court's

2/ 22 O.S. [1971] §1171 was repealed in 1980. The statute regarding commitment is now codified in 22 O.S. §1175(2).

decision denying state funds to hire a psychiatrist to present mitigating factors on behalf of the defendant. Since 1976, this Court has continually required as constitutionally mandated under the Eighth Amendment, that capital sentencing procedures focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. Gregg v. Georgia, 428 U.S. at 206. This Court reiterated these safeguards in Eddings v. Oklahoma, 455 U.S. 104 (1982), by invalidating a death sentence imposed without the consideration of individualized mitigating factors required by the Eighth and Fourteenth Amendments in capital cases. This Court stating:

"Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating circumstances." Eddings, supra, 455 U.S. 104. (Emphasis in original) at 113-114.

Recently, this Court reaffirmed its strong stance on individualized sentencing by stating "what is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. Zant v. Stephens, ___ U.S. ___, 51 L.W. 4801 (1983) citing Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion); Roberts [Harry] v. Louisiana, 431 U.S. 633 (1977); Gregg, supra at 197 (plurality opinion); Proffitt v. Florida, 428 U.S. at 251-252, (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976) (plurality opinion).

In Bounds v. Smith, 430 U.S. 817 (1977), this Court adhering to its earlier decision in Younger v. Gilmore, 404 U.S. 15 (1971) that law libraries are alternative sources of legal knowledge and are constitutionally mandated, held that the fundamental right of access to the courts requires prison

authorities to assist inmates in the preparation and filing of meaningful legal papers by providing adequate libraries for adequate assistance from persons trained in the law. Justice Black in his plurality opinion in Griffin v. Illinois, 351 U.S. 12 (1956) declared that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has." The principles of Griffin apply to this Court's decision to strike down a state practice of granting appellate review only to persons able to afford a trial transcript. Similarly, in Douglas v. California, 372 U.S. 353 (1963), this Court held that an indigent was entitled to counsel on his first direct appeal as a matter of right.

This Court has also recognized limits on the principle of protecting indigents in the criminal justice system. In Boss v. Moffitt, 417 U.S. 600 (1974), this Court held that indigents had no constitutional right to appointed counsel for a discretionary appeal and in United States v. MacCollum, 426 U.S. 317 (1976) (plurality opinion), this Court rejected an equal protection challenge to a federal statute which permits a district court to provide an indigent with a free trial transcript only if the court certifies that the challenge to his conviction is not frivolous and the transcript is necessary to prepare his petition.

Recently this Court in Bearden v. Georgia, ___ U.S. ___ 103 S.Ct. 2064 (1983) held that in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. Only if the probationer willfully refuses to pay or fails to make sufficient bonafide efforts legally to acquire the resources to pay, the court may revoke probation and sentence him to imprisonment. If the probationer could not pay despite sufficient bonafide efforts to acquire the resources to do so,

alternative measures of punishment other than imprisonment must be considered. If alternative measures are not adequate to meet the State's interest in punishment and deterrence, the court may imprison a probationer who has made sufficient bonafide efforts to pay. This Court concluded that such a deprivavation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

The instant case is not a situation wherein the trial court has discretion to determine whether to grant funds for expert witnesses nor is it a situation where the State of Oklahoma has provided through their mental institutions, an opportunity to be examined for mitigational evidence dealing with psychiatrists but an absolute ban due to lack of funds of an indigent's right to have a doctor examine him to determine mitigating circumstances or rebut aggravating circumstances.

It should further be noted Oklahoma law establishes as an aggravating circumstance "the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" 21 O.S. §701.12(7)3. This Court, in its recent opinion in Barefoot v. Estelle, ___ U.S. ___, 51 L.W. 5189 (1983), determined that it is totally proper for a state psychiatrist to testify regarding the defendant's probability of future acts of violence.

"If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the views of state psychiatrists along with the opposing views of the defendant's doctors."

3/ This circumstance was instructed on but not found in Petitioner's case.

In footnote 5 of the Opinion in Parefoot, this Court specifically recognizes the problem ones indigency might cause.

"nor is there a contention that, despite Petitioner's claim of indigence, the Court refused to provide an expert for Petitioner. In cases of indigency, Texas law provides for the payment of \$500.00 for [expenses incurred for purposes of investigation and expert testimony]."

Oklahoma's procedure provides for no such funds for expert witnesses nor do they give discretion in the trial court to order them at the expense of the State nor do they allow for the trial court to send the defendant to the state hospital for a determination on mitigating factors.

An indigent defendant in Oklahoma is without the ability to have psychiatrists examine him to establish mitigating factors and to rebut a contention of probability of future acts of violence. In the instant case, Petitioner was precluded from presenting expert testimony in mitigation regarding the emotional framework of the Petitioner at the time of the event and his general psychological background solely because of his inability to hire these experts. Petitioner's ability to present evidence of this type in mitigation was precluded by the state law not authorizing the expenditure of funds for the examination by state doctors on the issues of mitigation. Petitioner contends that the Eighth and Fourteenth Amendments to the Constitution of the United States and the Sixth Amendment Right to effective assistance of counsel at the punishment stage of a capital trial require a standard whereby an indigent may have an opportunity to present psychological evidence in mitigation under a set of closely defined rules established by the states. The ability to come up with five hundred to one thousand dollars for an expert should not be a basis to determine who should live and who should die.

II.

THIS COURT SHOULD REVERSE PETITIONER'S DEATH SENTENCE SUMMARILY ON THE GROUND THAT OKLAHOMA HAS FAILED TO ADHERE TO THE REQUIREMENTS OF WITHERSPOON V. ILLINOIS BY APPROVING, IN PETITIONER'S CASE, THE EXCLUSION OF JURORS WHO MERELY VOICED GENERAL OBJECTIONS TO THE DEATH PENALTY AND WOULD HAVE ALLOWED THE DEATH PENALTY TO AFFECT THEIR DELIBERATIONS.

The Oklahoma Court of Criminal Appeals has never reversed a death sentence on Witherspoon grounds. No matter how much the trial court deviated from the questions approved by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), the Court of Criminal Appeals has invariably held the jurors were properly excluded based on their often tentative equivocal answers. See Chaney v. State, 612 P.2d 269; Rowhothan v. State, 542 P.2d 610; Smith v. State, 659 P.2d 330 (Okl.Cr. 1983).

Since Petitioner was tried and sentenced by a jury from which several veniremen were excluded merely for voicing general opposition to the death penalty, as though Witherspoon has never been decided by this Court, his death sentence should be summarily reversed. In a two to one decision with a state trial court judge writing the majority opinion, the Oklahoma Court of Criminal Appeals overlooked blatant Witherspoon errors. As Judge Brett conclusively demonstrates in his dissent on Witherspoon grounds, Jurors Metivier and Musgrave were improperly excused. In the instant case, the majority of the Court of Criminal Appeals, rather than requiring in accordance with Witherspoon that a juror assure the court that he would not automatically vote against the death penalty or that his opinion about capital punishment would prevent him from returning a guilty verdict, has required that a veniremen's unhesitating, unambiguous expression of a willingness to impose the ultimate penalty be required before that juror can sit on a jury.

As dissenting Judge Brett points out, Juror Metivier's answer that she did not believe in taking one's life, did not reflect her unwillingness to consider death as a punishment. This is especially true in light of defense counsel's questioning of Juror Metivier to the effect that she would not automatically refuse to impose the death penalty.

Similarly, the majority opinion of the Oklahoma Court of Criminal Appeals totally ignores this Court's Opinion in Adams v. Texas, 448 U.S. 38 (1980). Juror Musgrave was excused merely because she could not agree to a verdict imposing the death penalty without it doing violence to her conscience. As so properly stated by Judge Brett in his dissent: "Whether it would do violence to her conscience is not the issue. The mere fact that one's conscience might be violated or affected by that juror's decision to impose the death penalty, is not grounds for excusal under Witherspoon." A jury selected according to the interpretation placed on Witherspoon in the instant case, is one uncommonly willing to condemn a man to die. Witherspoon v. Illinois, 391 U.S. at 521. This Court should summarily reverse Petitioner's death sentence or Witherspoon error will run rampant in future Oklahoma capital cases.

III.

THIS COURT SHOULD GRANT CERTIORARI TO CLEAR UP THE OKLAHOMA COURT OF CRIMINAL APPEALS' INTERPRETATION OF THE AGGRAVATING CIRCUMSTANCE "CRUEL, HEINOUS AND ATROCIOUS" BECAUSE THE OKLAHOMA COURT OF CRIMINAL APPEALS' INTERPRETATION FAILS TO NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court of Criminal Appeals affirmed the finding of the aggravating circumstance "especially heinous, atrocious and cruel. The court stated the definition of the circumstance adequately guided the jury. This definition stated:

"You are further instructed that the term heinous as that term is used in these instructions, means extremely wicked or shockingly evil, and that atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others; pitiless."

Petitioner, on appeal to the Oklahoma Court of Criminal Appeals contended that to fall within the category of this aggravating circumstance, a substantial amount of physical or mental torture must precede the killing. State v. Dixon, 238 So.2d 1 (Fla. 1973). The Court of Criminal Appeals in its Opinion, stated:

"However, in construing 21 O.S. Supp. 1976 §701.12 (4), we are not bound only by the limitation that our interpretation not be open ended." Citing Gregg v. Georgia, supra.

It is interesting to note that the Oklahoma Court of Criminal Appeals does not even address this Court's decision in Godfrey v. Georgia. 446 U.S. 420 (1980). The Oklahoma court categorizes the shooting by petitioner in his own home of several peoples, one of whom being his wife and two being his brother-in-laws, as a mass murder and determines that the acts are atrocious as defined in the instructions.

It should be noted that this is not the Oklahoma Court of Criminal Appeals' first enlargement of the scope of this aggravating circumstance. This Court noted in Eddings v. Oklahoma, 455 U.S. 104 (1982).

"We understand the Court of Criminal Appeals to hold that the murder of a police officer in the performance of his duties is heinous, atrocious or cruel under the Oklahoma statutes. See Roberts v. Louisiana, 431 U.S. 633 (1977). However, we doubt that the trial judge's understanding and application of this aggravating circumstance conform to that degree of certainty required by our decision in Godfrey v. Georgia, 446 U.S. 420 (1980)." See n.3, supra. Footnote 4 to this Court's Opinion in Eddings.

The open ended construction of this aggravating circumstance shows that the Oklahoma Court of Criminal Appeals has failed to narrow the class of persons eligible for the death penalty. As this Court recently stated in Zant v. Stephens, ___ U.S. ___, 51 L.W. 4891 (1983):

"Thus in Godfrey v. Georgia, 446 U.S. 420 (1980), the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty. Justice Stewart's Opinion for the plurality concluded that the aggravating circumstance described in sub section (b)(7) of the Georgia statute as construed by the Georgia Supreme Court, failed to create any inherent restraint on the arbitrary and capricious infliction of the death sentence because a person of ordinary sensibility could find that almost every murder fit the stated criteria. Moreover, the facts of the case itself, did not distinguish the murder from any other murder. The plurality concluded that there was no principal way to distinguish this case in which the death penalty was imposed, from the many in which it was not."

The open ended construction placed on this aggravating circumstance by the Oklahoma Court of Criminal Appeals cannot withstand constitutional scrutiny under the Eighth and Fourteenth Amendments. It is imperative that this Court clear

up the Oklahoma Court of Criminal Appeals interpretation of this aggravating circumstance and summarily remand this cause to the Oklahoma Court of Criminal Appeals in light of this Court's Opinion in Godfrey and Zant, supra.

IV.

THIS COURT SHOULD GRANT CERTIORARI TO REQUIRE THE OKLAHOMA COURT OF CRIMINAL APPEALS TO FULFILL, IN PETITIONER'S CASE, THE CONSTITUTIONAL MANDATE OF PROPORTIONALITY REVIEW UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS IN CAPITAL CASES AND PETITIONER'S DUE PROCESS RIGHT TO PROPORTIONALITY REVIEW GUARANTEED UNDER THE OKLAHOMA STATUTES.

By statute, the Oklahoma Court of Criminal Appeals is required to include in its decision, a reference to those similar cases which it took into consideration in determining whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases, 21 O.S. §701.13(C)(3) and (E).

This Court in Hicks v. Oklahoma, 447 U.S. 343 (1980) held that Petitioner's interest in the exercise of jury discretion in imposing punishment is not merely a matter of state procedural law, but is a liberty interest the fourteenth amendment preserves against arbitrary deprivation by the State. The liberty interest to Petitioner in proportionality review of capital sentences is as important as the statutory right to have a jury impose sentence. Petitioner contends that the Oklahoma Court of Criminal Appeals' refusal to compare this case to similar cases under Oklahoma law, violated well established procedures of proportionality review by the Oklahoma Court of Criminal Appeals. The Oklahoma Court of Criminal Appeals, in all recent cases affirming death sentences, has required this comparison. See Generally, Smith

v. State, 659 P.2d 330 (Okl.Cr. 1983); Ake v. State, 663 P.2d 1 (Okl.Cr. 1983); Munn v. State, 658 P.2d 482 (Okl.Cr. 1983) (Modifying petitioner's sentence to life imprisonment) (Plurality Opinion). Parks v. State, 651 P.2d 686 (Okl.Cr. 1982); Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980); Hays v. State, 617 P.2d 223; Jones v. State, 648 P.2d 1251 (Okl.Cr. 1982); Stafford v. State, F-79-722 (June 20, 1983); Coleman v. State, F-79-600 (July 11, 1983).

It is hard to imagine that a state created right to proportionality review in sentencing can be violated by virtue of an appellate judge disqualifying and a state trial judge replacing him and making a decision not to grant Petitioner proportionality review comparing similar cases as required under Oklahoma law.

Petitioner also contends that as a matter of federal constitutional law, the standard of proportionality review required under the Eighth and Fourteenth Amendments was violated by affirming Petitioner's conviction without comparing it to other Oklahoma capital convictions. As stated earlier in this section, Oklahoma until Petitioner's case has routinely compared death cases to each other to determine if the death penalty in one case is proportionate to the death penalty in another /4/. This Court currently has pending before it the case of Pulley v. Harris, 51 L.W. 3678 (1983) wherein this Court will decide what type of proportionality review in capital cases is required by the Eighth and Fourteenth Amendments. The standard of appellate review in petitioner's case is no different than the standard condemned by the Fourth Amendment. Harris v. Pulley, 692 F.2d 1183. This Court should grant certiorari to determine the appropriate proportionality review required under the Eighth and Fourteenth Amendments.

^{4/} For a discussion on proportionality review in Oklahoma, see Munn v. State, 658 P.2d 482 (Okl.Cr. 1983) Plurality Opinion of Judge Cornish who excused himself in Petitioner's case.

CONCLUSION

For the reasons stated above, the petitioner requests a writ of certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert A. Ravitz, certify that I mailed a copy of this Petition for Certiorari and all accompanying documents to Michael C. Turpen, Attorney General, State of Oklahoma, Suite 112, State Capitol, Oklahoma City, Oklahoma 73105 the 29th day of July, 1983.

Robert A. Ravitz

ROBERT A. RAVITZ

APPENDIX A

Opinion of the Oklahoma
Court of Criminal Appeals

MAY 9 1983

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

G. Ross N. Hard, Jr.
CLERK

FOR PUBLICATION

CHARLES WILLIAM DAVIS,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

No. F-78-140 & F-78-141



- O P I N I O N -

POWERS, Special Judge:

The appellant was convicted of Murder in the First Degree and sentenced to death in Oklahoma County cases no. CRF-77-2905 and 2906. The jury assessed the death sentence after finding the following three (3) aggravating circumstances in each case: that the murder was especially heinous, atrocious or cruel; the defendant was previously convicted of a felony involving the use or threat of violence to the person; the defendant knowingly created a great risk of death to more than one person. On March 16, 1978, the Honorable David M. Cook imposed the judgments and sentences, and the sentences of death were stayed by this Court in its Order of March 23, 1978, pending the resolution of this appeal. Oral argument was heard by this Court on August 31, 1981.

The two victims of an early morning shooting on August 13, 1977, at the appellant's apartment in Oklahoma City, were Dennis McLaughlin and Robert Wayne Jones. Wounded but not killed during that same incident were Kathy Jones Rogers, also known as Kathy Jones Davis, and Henry Jones. A total of six (6) bullets were fired from the .38 caliber revolver.

Three days prior to the homicide, the same four individuals met with the appellant at a Humpty Dumpty store parking lot in Sapulpa, apparently with reference to the marital separation of Kathy Rogers and the appellant. Robert Jones and Henry Jones, Kathy's brothers, and Dennis McLaughlin, their friend, accompanied Kathy to the Sapulpa meeting.

The group then appeared at the appellant's apartment early on Saturday morning, August 13, to remove Kathy's possessions from the apartment of her estranged husband. Kathy Rogers and Henry Jones testified that the four first stopped by the Oklahoma City Police station to obtain protection in their visit to the appellant's apartment, but they were unsuccessful. After all of Kathy's property had been removed from the premises, the four returned to the apartment for a final survey, and it was at this point that the appellant shot them.

In his first proposition of error, the appellant maintains that the trial court denied him his right to present mitigation in his behalf and deprived him of due process and equal protection of the laws when the court failed to provide funds for expert witnesses or to give him a presentence investigation.

This Court has held that there is no right to State funds to hire an investigator or a psychiatrist to present mitigating factors on behalf of a defendant. Eddings v. State, 616 P.2d 1159 (Okl.Cr.1980). The right to counsel is guaranteed by the Constitution, but that right has not been interpreted to include expert assistance in the determination of appropriate punishment. Furthermore, the appellant's assertion that the court should have granted the requested presentence investigation report is without merit. The purpose of the presentence investigation is to provide "...a recommendation as to appropriate sentence, and specifically a recommendation for or against probation." Laws 1975, ch. 369, § 1; now 22 O.S.Supp.1980, § 982. That statute specifically excludes those cases in which the death penalty is imposed. And this Court has held that the denial of pretrial motions for a presentence investigation report and appointment of a psychiatrist in a case in which a defendant has been sentenced to death was not error under this statute. Irvin v. State, 617 P.2d 588 (Okl.Cr.1980), reaffirming Bills v. State, 585 P.2d 1366 (1978).

The appellant alleges, in his second argument, that the jury was selected in violation of the standards mandated by the United States Supreme Court. Certain jurors were excluded for cause, over the objection of defense counsel, as a result of their beliefs

" regarding the death penalty.

In Witherspoon v. Illinois, the Supreme Court held "...that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), at 20 L.Ed.2d 784-85. In a footnote to that opinion, the Court said, "The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge...." Footnote 21, at 20 L.Ed.2d 785.

In the case before this Court, the trial court systematically asked the jurors two questions as follows:

In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

If the juror's reply was negative, the court asked:

If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree, and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

The appellant contends that in excluding several of the jurors the trial court violated the rule in Witherspoon. A review of the record indicates that Juror Rockel was properly excluded due to her inability to positively answer that she could inflict the death penalty under the appropriate circumstances. Furthermore, the following jurors were properly excluded: Hood, Childress, Sillaway, Derrick and Hearst. However, the exclusion of three others requires a more thorough analysis.

The court conducted the following voir dire of Juror Metivier:

THE COURT: I ask you: In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. METIVIER: I have problems with that.

THE COURT: You what?

MS. METIVIER: I have problems with that.

THE COURT: You have problems with the Death Penalty? And I ask you a second question: If you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree, and if under the evidence and the facts and the circumstances of the case the law would permit you to consider a sentence of Death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

MS. METIVIER: No.

THE COURT: You would not inflict the Death Penalty in spite of the evidence, the law and the circumstances of the case? Do I understand you?

MS. METIVIER: Right.

MR. STUART: May I be allowed to ask an additional question?

THE COURT: Yes.

MR. STUART: Ms. Metivier, my question, and I am asking you, do I hear you right? Are you saying that you could never impose the Death Penalty in any case? You are not saying that under a proper case, that you couldn't consider imposing the Death Penalty?

MR. COATS: I object to the form of the question, Your Honor.

THE COURT: The form of the question is improper. It is sustained.

MR. STUART: Ms. Metivier, you are not saying you would automatically refuse to impose the Death Penalty in any case, are you?

MS. METIVIER: No, I'm not.

MR. STUART: That's all I have.

THE COURT: I ask you again: If you found beyond a reasonable doubt that this Defendant was guilty of Murder in the First Degree, and if under the evidence and facts and circumstances of this case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

The reason I repeat the question is because you answered that you would not under any circumstances inflict the Death Penalty when I first asked the question. How do you answer the question now?

MS. METIVIER: I just don't believe in taking one's life. I'm not -- You know, --

THE COURT: You are excused for cause.

MR. STUART: May I approach the bench?

THE COURT: Come to the bench.

(The following proceedings were had out of the hearing of the jury.)

MR. STUART: I am going to object to excusing this Juror for cause. I will move for a mistrial on the basis of this. This Juror answered my questions of: Would you automatically refuse to impose the Death Penalty? And she said No.

THE COURT: The objection is overruled.

The Juror Metivier answered "I have problems with that" when asked if she could, in a proper case, agree to imposing the death sentence. She answered "Right" when asked if she would not inflict the death penalty in spite of the evidence, the law, and the circumstances. When that question was repeated by the Court, she answered "I just don't believe in taking one's life."

Although the Juror gave conflicting answers to questions by the Court and Counsel, her answers, when viewed in their entirety, clearly indicated her inability to consider the death sentence under any circumstances.

We now examine the excusing for cause of Juror Dragus. While the majority of her answers were tentative, she positively stated that she would not inflict the death penalty. And although the question defense counsel was prohibited from posing was no more confusing than the court's questions, it, nevertheless, was not the appropriate question. Juror Dragus had already given a positive indication of her inability to vote for capital punishment.

Finally, we consider the excusing on voir dire of Juror Musgrave:

THE COURT: In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. MUSGRAVE: I believe I could.

THE COURT: That is not a sufficient answer. I take that as being an answer tantamount to saying that you don't know. I will ask it again.

In a case where the law and the evidence warrant, that is a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. MUSGRAVE: I don't believe I could.

THE COURT: You don't believe you could? If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

MS. MUSGRAVE: No.

THE COURT: Ma'am?

MS. MUSGRAVE: No. I don't think I would.

THE COURT: You would not?

MS. MUSGRAVE: Huh-uh.

THE COURT: Is that a positive answer?

MS. MUSGRAVE: Yes, sir.

THE COURT: Or not?

MS. MUSGRAVE: Yes, sir.

MR. STUART: The same objection, Your Honor.

THE COURT: All right. The objection is overruled.

MR. STUART: May I be allowed to ask one question?

THE COURT: Yes, you may.

MR. STUART: Miss Musgrave, I believe I heard you say to that final question that you don't think you would. Now, that -- Do I hear that to mean that you could possibly impose the Death Penalty in some particular case?

MS. MUSGRAVE: Yes. That is right.

MR. STUART: Yes, ma'am. That's all I have.

THE COURT: Well, I ask again. In this case if the law and the evidence warrant, in a proper case, if this is a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty? I cannot accept anything short of a positive response to that question, Miss Musgrave. Yes or no?

MS. MUSGRAVE: No. I would say no.

THE COURT: All right. Anything further?

MR. STUART: Yes, sir. May I approach the bench?

THE COURT: Yes.

(The following proceedings were had out of the hearing of the jury.)

MR. STUART: At this time, we move for a mistrial, and we would object to any excusing of Mrs. Musgrave for cause as on this second question she said, "I think I could." She told me she could in a proper -- She didn't say she couldn't in any case, and that is what Witherspoon is directed at, and we strenuously object to excusing this Juror.

MR. COATS: I would say Counsel's questions were so leading that she would answer it -- She has fairly answered the Judge's questions set out by the Court which is proper, and we move to have her excused.

MR. STUART: May I further say on the record that I think the Judge's question regarding this particular case is not the proper question. A proper case is to be determined by the Jury. This case is not in point now. They can't properly even consider it. The proper question is whether or not they could consider imposing the Death Penalty in some case or a proper case. Not this particular case.

THE COURT: The Defendant's objection is overruled. The Juror will be excused for cause.

(The following proceedings were had in the hearing of the jury.)

THE COURT: Thank you, Mrs. Musgrave. You are excused for cause.

First, Juror Musgrave indicated that she believed that she could agree to the death penalty without doing violence to her conscience. The court demanded a more positive answer and she said that she didn't believe she could agree to the death penalty without its having an effect on her conscience. Then the court asked her his standard, "Would your reservations prevent you from voting for the death penalty?" question. She said, "No," followed by, "No. I don't think I would." The defense attorney then asked if that meant she could possibly impose the death penalty in a particular case, and she said, "Yes. That is right." Finally, the court asked her his standard, "Could you agree to a verdict imposing the death penalty without its doing violence to your conscience?" question, and she answered, "No."

As was the case in the voir dire of the Juror Metivier, the answers of the Juror Musgrave were also conflicting and confusing. However, when viewed in their entirety, her answers also clearly indicated her inability to consider the death sentence under any circumstances.

The Supreme Court has held that a sentence of death cannot be upheld if potential jurors are excluded from the panel imposing that punishment on the basis of their personal beliefs about the death penalty. Witherspoon, *supra*. The only legitimate concern upon voir dire of the jury panel is whether they will consider the imposition of the death sentence, as one of the alternatives provided by state law, should the case be appropriate for that punishment.

The voir dire examination of the jurors Metivier, Dragus and Musgrave, as set out herein, followed the guidelines set forth in Koonce v. State, 456 P.2d 549 (Okl.Cr.1969) and Gibson v. State, 501 P.2d 891 (Okl.Cr.1972). When the voir dire examination is viewed in its entirety as to each juror, and in the light most favorable to the defendant, the trial judge could only conclude that the mind of each juror was that said juror was irrevocably committed, before the trial began, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. Their answers were ambiguous, hesitant and equivocal. The trial judge was in a position to view the facial expressions, voice inflection, and mannerism in answering the questions on voir dire. He evaluated the responses from the totality of the courtroom environment and experience on that day. The record supports his evaluation. Accordingly, no error occurred in excusing the jurors.

The appellant's third proposition addresses the excusing for cause of jurors who cannot state that they could consider the death penalty under Witherspoon vis a vis the challenge of jurors for implied bias, R.L. 1910, § 5859; now 22 O.S.1981, § 660. The State's classification of this as a suggestion by the appellant that this Court ignore the mandate of the Supreme Court in Witherspoon or hold 22 O.S.1981, § 660, unconstitutional is unfounded. The Supreme Court did not hold that jurors who could not consider the death penalty must be excluded, it simply said that was a valid basis for exclusion.

The argument that Section 660 precludes excusal for cause under Witherspoon has been rejected by this Court. Gibson, *supra*, and Koonce, *supra*. We are unpersuaded that these holdings should be reconsidered.

In his fourth proposition, the appellant states that the jury instructions unconstitutionally shifted the burden of proof to him to mitigate the homicide from murder to manslaughter, drawing the Court's attention specifically to Instructions No.5, 5A, 7, 8, 9, 10, and 14. He alleges that he was required to prove that his actions were executed in the heat of passion upon adequate provocation and in the absence of malice, which effectively forced him to prove that the homicide was manslaughter, not first degree murder, citing Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39(1979); and Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); and distinguishing Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

The trial court's instructions have been examined. In Instruction No.5, the court defined and required proof beyond a reasonable doubt of all of the elements of murder in the first degree, with emphasis on malice. Circumstantial evidence was the subject of Instruction No.6. In the seventh instruction, manslaughter in the first degree was defined as a lesser included offense of murder in the first degree, with emphasis on absence of malice and heat of passion. Instructions No.8, 9 and 10 defined heat of passion, adequate provocation, and absence of malice. Instruction No.14 summarized the definitions of murder in the first degree and manslaughter in the first degree, with emphasis on the State's burden to prove all elements beyond a reasonable doubt and the operation of presumptions in the defendant's favor.

The State charged the appellant with murder in the first degree and proved each and every element of that crime. Included within that crime under the facts of this case is manslaughter in the first degree, and the court carefully instructed the jury regarding each and every element of that crime. See both the majority and concurring opinions in Morgan v. State, 536 P.2d 952 (Okl.Cr.1975). The use of the word "reduce" in comparing manslaughter to murder when instructing on the heat of passion upon

adequate provocation, as was done in Instructions 8 and 9, does not operate to shift the burden of proof to the defendant. The State was not required to prove absence of malice and heat of passion upon proof that the appellant had committed murder with malice aforethought. However, the jury was free to interpret the facts proved and determine that the State had proved manslaughter rather than murder. This bears no relationship to any proof demanded of the appellant.

The appellant maintains that Mullaney v. Wilbur, supra, controls. In Mullaney, a statutory presumption operated against the defendant that he had committed the homicide with malice aforethought. This presumption, however, could be rebutted upon proof, by the defendant, that he had acted in the heat of passion. Mullaney's jury was instructed that malice aforethought and heat of passion are inconsistencies and that the defendant could negate the former by proving the latter. The Supreme Court held that this was a shifting of the burden of persuasion to the defendant, in contravention of his right to due process of the law.

In Patterson v. New York, supra, the statutory scheme provided for the affirmative defense that the defendant had acted under an extreme emotional disturbance for which there was a reasonable excuse. The Supreme Court held that the Patterson court, unlike Mullaney, did not shift the burden to the defendant to disprove any fact essential to the offense because the affirmative defense of emotional disturbance bore no direct relationship to any element of murder. Unlike Mullaney, nothing was presumed in Patterson. The Court held, "To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue..." 53 L.Ed.2d at 291.

The principal of Patterson is applicable even though Patterson involved proof of an affirmative defense. The State is not required to prove the nonexistence of a lesser included crime in order to prove the greater crime. Accordingly, Mullaney is not

applicable because no presumptions operated to relieve the State of its burden to prove each and every element and there was no shifting to the defendant of any burden of proof.

Instruction No.5A, to which the defense's objection was overruled, reads as follows:

You are further instructed that a design to effect death may be inferred from the fact of the killing when that killing is done by the use of a dangerous weapon in such a manner as naturally and probably, to cause death unless the circumstances raise a reasonable doubt whether such design existed.

The appellant maintains that this instruction parallels the unconstitutional presumption struck down in Sandstrom v. Montana, supra. In Sandstrom, the jury was told that "the law presumes that a person intends the ordinary consequences of his voluntary acts," thus effectively absolving the State from proving each and every element beyond a reasonable doubt.

The distinction is obvious. In the case at hand, no presumption was declared. An inference was provided, but the jury was not directed that a legal presumption should or would be followed.

As his fifth assignment of error, the appellant seeks reversal on the basis of certain instructions which he says denied him his right to have his claim of self-defense considered by the jury. Specifically it is alleged that Instructions No.12, 12A, and 12B misstated the law and denied him his self-defense theory; and that Instruction No.12A shifted the burden of proof to him. The only objections made at trial went to 12A and 12B as repetitive and confusing.

The primary argument is that Instruction No.12, which parallels the self-defense instruction discredited by this Court in Neal v. State, 597 P.2d 334 (Okl.Cr.1979), denied the appellant his right to an instruction on his theory of defense. A defendant is entitled to an instruction on his defense when that theory is supported by the record. Holt v. State, 278 P.2d 855 (Okl.Cr. 1955).

The following Instruction No.12 was given by the trial court:

In this case, the defendant, as one of his defenses, says that at the time of the difficulty, he, the said defendant, was justified and in doing as he did, he was acting in his necessary self defense to protect himself from the unlawful attack of his adversary, and when a person is unlawfully attacked in such manner as to induce in him a reasonable belief that he is in danger of losing his life, or of suffering great bodily harm, he is not required to retreat, but has the right to stand his ground and use whatever force that seems necessary to repel the attack in order to save himself from death, or to prevent what appears to him to be great bodily injury threatened to himself, but he should at the time use all reasonable means, apparent to a reasonable person under the circumstances, to avoid such danger, before injuring any person.

It is not necessary for this defense that the defendant's danger should have been actual or real, all that is necessary is that the defendant, from his standpoint, and under all the circumstances in the case, had reasonable cause to believe, and did honestly believe, there was imminent danger to his life or of great bodily injury being done to him, and in determining whether or not the defendant acted in his own necessary self defense, you shall view the circumstances as they then existed from the standpoint of the defendant, and viewing the circumstances from that standpoint, you shall determine whether or not he was acting reasonably in his own necessary self defense.

Should you find from the evidence in this case that the defendant acted in his own necessary self defense, or should you entertain a reasonable doubt thereof, you should give the defendant the benefit of such doubt and acquit him.

The same instruction was criticized by this Court in Neal v. State, supra, and the assault and battery conviction was reversed. In that decision, this Court said, "This instruction is confusing at best. It states that the appellant did not have a duty to retreat; but it then provides that he should have used 'all reasonable means,...to avoid [the] danger.'" Neal at 337. However, Neal was not reversed on the basis of that instruction alone. The evidence was not overwhelming and the prosecutor relied on the confusing instruction to argue that the defendant had not tried to retreat before defending himself. Porter v. State, 611 P.2d 278 (Okla.Cr.1980).

The record includes five instructions defining and explaining the self-defense theory and applicable law. Instruction No.11 defines justifiable homicide and introduces the concept of self-defense. Instruction No.12 is the Neal instruction. Instruction No.12A describes the circumstances under which one might reasonably fear that he is in danger of injury or death at the hands of the deceased resulting in a justifiable homicide. Instruction No.12B defines "necessary self-defense" as "a necessity imminent at the time of the killing and not prior thereto." That instruction also qualifies the defense to the extent that, should the deceased flee and the defendant pursue him when he is no longer in danger, it is not a killing in self-defense. And, finally, Instruction No.13 deals with a situation in which the defendant is the initial aggressor, in which case self-defense does not apply. An important concept in that instruction is stated as follows:

But one who is not the aggressor and is in a place where he has a right to be, when violently assaulted, or when by the hostile [sic] conduct or demonstration of another, he is induced to apprehend a design on the part of the latter to take his life or inflict upon him some great bodily harm may, without retreating, stand his ground and resort to the use of such force and violence as to him seems reasonably necessary for his own safety, even to the taking of life, and such killing will be justified on the ground of self-defense, even though such danger was not real, but apparent. [Emphasis added.]

This instruction breaks down the inherent inconsistency of Instruction No.12 by further explaining the concept of means that are reasonable to avoid the danger against which the defendant has acted to secure his own safety. Our thorough examination of these instructions and the law on self-defense reveals that the appellant was not denied his defense theory.

Also attacked are two portions of the closing arguments by the prosecutors, which the appellant cites to bring this case directly within the Neal rule. However, an examination of those arguments reveals no improprieties, nor exacerbation of any confusion created by Instruction No.12.

Finally, an attempt is made to characterize Instruction No.12A as shifting the burden, in violation of Mullaney v. Wilbur, supra. That argument, however, is completely without merit. No

part of the cited instruction indicates that the defendant bears the burden to prove beyond a reasonable doubt that he acted in self defense. Furthermore, the citation to Berrier v. Egeler, 583 F.2d 515 (6th Cir.1978), cert. den. 439 U.S. 955, 99 S.Ct. 354, 58 L.Ed.2d 347 (1978), is inappropriate. In Berrier, the jury was instructed that the defendant had to prove self defense. Yet, under Michigan law, proof of the absence of self defense is an element of murder, which must be proved by the State. The Sixth Circuit Court of Appeals reversed the conviction because of an unconstitutional shifting of the burden of proof, citing In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Mullaney v. Wilbur, and Patterson v. New York, supra. However, the law in Oklahoma does not include the absence of self defense as an element of murder. No error is found.

In his sixth assignment of error, the appellant argues that the trial court erroneously overruled his pretrial motion in limine to exclude a prior murder conviction from use in impeachment. The motion was not re-urged at trial, and the evidence of the prior conviction was admitted when the appellant testified in his own behalf, and not when the State cross-examined him, as had been anticipated by the pretrial motion.

A motion in limine is a written pretrial motion to preclude evidence which would have no proper bearing on the issues and would prejudice the jury. Tahdoohnippah v. State, 610 P.2d 808 (Okl.Cr.1980). The ruling on a motion in limine is advisory only, and an incorrect ruling is not reversible error. In fact, no error occurs until the matter arises during trial, an objection is entered, and, at that time, the trial court incorrectly permits or prohibits it. Teegarden v. State, 563 P.2d 660 (Okl.Cr.1977). In the case at hand, the appellant's own testimony was the source by which the jury was exposed to the evidence of his prior conviction. No relief is available on appeal.

The seventh proposition on appeal addresses the trial court's denial of the appellant's motion for continuance, filed on the first day of trial, which was based upon the pendency of a

collateral attack on the prior murder conviction in Missouri. That conviction, arising out of a guilty plea, was allegedly secured in violation of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

In interpreting the "Postponement for Cause" statute, 22 O.S.1981, § 584, this Court has acknowledged that the ruling rests with the sound discretion of the trial court, which will not be disturbed absent abuse, and this is particularly true where the motion is offered on the date set for trial. Kirk v. State, 555 P.2d 85 (Okl.Cr.1976). Further, as the State argues on appeal, the pendency of an appeal from a conviction does not render the evidence of that conviction inadmissible. Newcomb v. State, 23 Okl.Cr. 172, 213 P. 900 (1923); now a part of the Evidence Code, at 12 O.S.1981, § 2609(e). The same rule applies to a pending collateral attack on a conviction. Therefore, Judge Cook properly exercised his discretion when he overruled the motion for continuance, knowing that the prior conviction, and evidence of the pending collateral attack, would be admissible evidence.

The excusing of a juror by the trial court, on defense counsel's motion, and substitution of an alternate juror, over objection of defense counsel, is urged as error in the eighth assignment. The defense had entered a motion for a mistrial upon the court's excusing of the juror, who had expressed the fear that she would be prejudiced by her previous contact with two State's witnesses, whom she recognized when they testified. The appellant urges this Court to reconsider its holding in Washington v. State, 568 P.2d 301 (Okl.Cr.1977), and find, instead, that 22 O.S.1981, § 601a, operates to the exclusion of all other causes upon which a juror may be excused.

Our review of the transcript indicates that the trial judge meticulously proceeded in the questioning of this juror, when she notified the court of her prior knowledge of the two witnesses, and, in the discussion with counsel, gave consideration to the argument that a mistrial should be declared. However, the court then found that an alternate juror had already been selected and

that defendant would not be prejudiced by the substitution of the alternate.

In Washington v. State, supra, this Court held that 22 O.S. 1981, § 601a, which provides for substitution of an alternate for a regular juror in the case of illness or death, is not exclusive, citing as persuasive People v. Howard, 211 Cal. 322, 295 P. 333 (1930), in which the California court found that the substitution had not substantially affected the rights of the defendant. This Court continued by acknowledging the trial court's inherent power to substitute jurors for good cause, citing Gregg v. State, 69 Okl.Cr.103, 101 P.2d 289 (1940), which relied on Boutcher v. State, 4 Okl.Cr.576, 111 P. 1006 (1910). In Boutcher, this Court held,

If, for any reason, the trial court is of the opinion or even suspects that any given juror is not fair and impartial..., it is not only the right, but is also the duty, of the court to excuse such juror either upon the challenge of one of the parties or upon the motion of the court without such challenge. Boutcher at 1008.

The appellant seeks reversal on a minor, technical matter, stating that the enactment of 22 O.S.1981, § 601a, abrogated the discretion of the trial judge to substitute a juror for any cause other than illness or death. There is no merit to this argument.

A multiple hearsay problem is drawn to this Court's attention in proposition number nine. A statement allegedly made by the now deceased Robert Jones relating a threat made by the appellant to him was elicited from Henry Jones on direct examination. The statement was admitted into evidence only after an in camera hearing in which the trial court scrutinized the question of the admissibility of both of the hearsay statements. The testimony of Henry Jones admitted, after the trial court's ruling, was as follows:

He told me that Charlie said he had a gun and that he ought to pull it out and shoot us all. (TR.510)

Robert Jones, while still at the scene of the confrontation, made this statement to Henry Jones immediately after his encounter with the appellant, Charles Davis, the Wednesday before the homicide.

Our examination of this twofold statement convinces us that the trial judge accurately analyzed the statements and that Henry Jones' testimony was properly admitted. First, there was the appellant's statement to Robert Jones, in effect a threat to kill Robert and the others. This statement was properly admitted to indicate the declarant's intent toward future conduct. Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed.196 (1933); Mutual Life Ins.Co. v. Hillman, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892); Wadley v. State, 553 P.2d 520 (Okl.Cr.1976); and Sallee v. State, 544 P.2d 902 (Okl.Cr.1976). This hearsay exception is now in effect by legislation. Laws 1978, ch. 285, § 803; now 12 O.S. 1981§ 2803 (3).

The second portion of this hearsay evidence consists of the statement made by Robert Jones to Henry Jones immediately after the alleged threat by the appellant. This clearly falls within the excited utterance exception, which this Court has held admissible, although it is hearsay, "...because it is thought to have independent indicia of reliability. That is, an excited utterance made contemporaneous with a specific event, which relates to or describes the event, is held to be reliable because its nearness to the stimulating event excludes the possibility of premeditation and fabrication." (Citations omitted) Bishop v. State, 581 P.2d 45 at 48 (Okl.Cr.1978). Thus, the sincerity of the statement is reliable. Now see 12 O.S.1981, § 2803(2).

Finally, these hearsay statements demonstrate a trustworthiness within the spirit of the specific exceptions. 12 O.S. 1981, § 2803(24); and § 2804(B)(5). The allegation of error is not supported by the law.

In his tenth argument, the appellant contends that the trial court erroneously ruled inadmissible the testimony of his probation officer, in which she would have testified that the appellant had stated to her, after the homicide, that his actions were in self-defense. The evidence allegedly should have been admitted under the hearsay exclusion, which is now embodied in 12 O.S.1981, § 2801(4)(a)(2). The pertinent portion of Section 2801 is as follows:

4. A statement is not hearsay if:

(a) the declarant testifies at the trial...and is subject to cross-examination concerning the statement, and the statement is

(2) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication...

However, in this trial, the excluded evidence was offered prior to any testimony establishing self-defense, and therefore it could not have properly been characterized as a prior consistent statement to rebut any State's evidence tending to establish recent fabrication.

In proposition number eleven, the appellant addresses the failure of the trial court to declare a mistrial when the appellant testified to evidence of another crime. The following dialogue occurred on cross-examination of the appellant by the District Attorney:

Q. Now, how many guns did you own during the week prior to August the 13th of 1977?

A. Two.

Q. What kind of guns were they?

A. A .25 automatic and a .38 automatic.

Q. All right, sir. What about State's Exhibit No. 28? When did you get that gun?

A. Oh, right after -- The next day after they pulled those guns on me up there in Sapulpa.

Q. All right. You already had two guns. Why did you get another one?

A. Well, Kathy had one of them.

Q. All right.

A. And the State Highway Patrol in Chandler had the other one.

Q. How did they get it?

A. They took it off me.

Q. Where did he take it off you?

A. On the freeway.

Q. Is that after you had been at this meeting in Sapulpa?

A. Yes, sir.

Q. So you had a gun up there with you?

A. Yes, sir.

MR. STUART: Your Honor, may I approach the bench?

THE COURT: Yes.

(The following proceedings were had out of the hearing of the Jury.)

MR. STUART: At this time, the Defendant moves for a mistrial because of the admission of evidence of another crime at the arrest by the Highway Patrolman and its prejudicial affect. [sic] I don't see any probative value.

MR. COATS: He volunteered it. I didn't specifically ask him about it.

THE COURT: Overruled.

There are several bases upon which the trial court's ruling is sustainable: the invitation of this evidence both by an unresponsive answer and by the appellant's own testimony regarding the meeting in Sapulpa and the existence of certain guns, Hainta v. State, 596 P.2d 906 (Okl.Cr.1979); failure by defense counsel to object in time to prevent the jury from hearing this evidence; and the giving of an instruction by the court in which evidence of other crimes was to be considered only for limited purposes. However, the primary issue here is whether the evidence of other crimes affected the verdict of the jury, and we find that it did not. These facts are susceptible to this Court's ruling in Agee v. State, 562 P.2d 913 (Okl.Cr.1977), where there was only an implication of another crime, obvious only to defense counsel. "To extend the protection of this [other crimes] rule to every possible implication which might be conceived by defense counsel would be a severe stretching of the rule. This Court is not willing to extend the rule this far." Agee, *supra*, at 916.

Improper impeachment is the subject of the twelfth proposition on appeal. The appellant testified, on direct examination, to his former conviction for murder. During cross-examination, the State elicited evidence of related parole violations.

Although both parties addressed this issue on appeal, neither cited relevant authority. Dick v. State, 596 P.2d 1265 (Okl.Cr.1979). This alleged error will not be considered.

In his thirteenth assignment of error, the appellant calls this Court's attention to the following argument made by the District Attorney at the close of the first stage of trial:

MR. COATS: ...I thought and believed that it was Murder in the First Degree when I filed this case...I think we believe that it is now.

* * *

[An objection was entered and overruled.]

...I am equally convinced at this point, listening to the evidence of the witnesses. I think the evidence amply demonstrates, all the way through here, and that you may be compelled to the one ultimate conclusion, and that is this Defendant committed two cases of Murder in the First Degree...

The prosecutor is permitted to draw logical inferences and state his conclusions based upon the evidence. Williams v. State, 557 P.2d 920 (Okl.Cr.1976). However, it is improper for the prosecutor to state his personal opinion or to influence the jury to rely on his expertise as the State's attorney. See Davis v. State, 413 P.2d 920 (Okl.Cr.1966). We find that the first portion of the District Attorney's argument, in which he states that he believed it was Murder in the First Degree at the time of filing, if error was harmless when weighed against the evidence of guilt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); James v. State, 637 P.2d 862 (Okl.Cr.1981).

Under his fourteenth assignment of error, the defendant argues that the misconduct of the prosecutor during closing arguments in the second stage of the trial proceedings irreparably prejudiced the defendant's right to a fair and impartial trial.

The statements of the prosecutor in his final argument of which defendant complains are as follows: "We are losing the ability to become angry. Doesn't it sometimes--Don't you sometimes feel that sometimes we have got to stand up and say no more? You know? No more."

After defendant's objection was overruled, the prosecutor continued, "That has got to stop? and you cannot commit crimes of this kind with impunity. And a life sentence for this man isn't punitive. We tried that already. And it didn't work...."

He continues further,

. . . I suppose you don't do it, and you pick up the morning paper in a month or a week or five years, and he has killed somebody else. How do you live with that? How do you say to yourself: You know, if I had had the courage to do what was right and what the evidence compels and what the law requires, if I had had the courage to do it then, it wouldn't have happened. Not only is there a distinct possibility that by coming out and saying no more, that you might deter others from this act. . . .

After a further objection was overruled, the prosecutor continued:

Suppose that you know by your judgment here and by having the courage to stand up and say it, suppose you just deter one other person from committing this crime. Cause one person to think just a minute before they do it. Before they pull that trigger, and they won't, and the score is even

In support of this allegation, defendant cites a number of cases wherein this Court has held that argument of counsel should be particular to the circumstances surrounding the crime of the individual defendant and not for the need of the community to speak out and deter others. (Mitchell v. State, Okl.Cr., 408 P.2d 566. Ball v. State, Okl.Cr., 375 P.2d 340; Potter v. State, Okl.Cr., 511 P.2d 1120; should not attempt to make the defendant bear the burden for an entire group of wrongdoers (Chase v. State, Okl.Cr., 541 P.2d 867); and should not attempt to get the issue of parole before the jury. (Evans v. State, Okl.Cr., 541 P.2d 469)).

None of the cases cited by defendant deals with argument of counsel in the second stage of a proceeding involving the death penalty. There was evidence in the case before us, during the second stage of the trial, that the defendant had been previously convicted of murder, and he did return from prison to kill again, not once, but twice, and caused serious bodily injury to two others. Nor can the remarks of the prosecutor be considered an "unmistakable reference" to the pardon and parole system. His remarks were derived solely from the direct evidence presented during both stages of the trial. The prosecutor was justified in his remarks, which fell within the boundaries of permissible closing argument.

Furthermore, any alleged error which might have occurred was waived by the defendant's failure to request that the jury be admonished to disregard the statement. In Sallee v. State, supra, this Court held that for an alleged error to be properly preserved for review by this Court on appeal, defense counsel must not only voice a timely objection, but must also request that the jury be admonished to disregard the statement. In that case, the defendant failed to request an admonishment and the court held he failed to properly preserve the record, thereby waiving his right to complain of the comments alleged as error.

For his fifteenth assignment of error appellant argues that the Oklahoma death penalty statute, 21 O.S.1981 § 701.9, constitutes cruel and unusual punishment; violates his right to due process and equal protection of the laws; perpetrates the arbitrary infliction of the death penalty; and reveals the total absence of any statutory mitigating circumstances.

That the death penalty is not cruel and unusual punishment was firmly established in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, (1976). We reiterate that it was constitutionally incorporated into our criminal procedure. Eddings v. State, 616 P.2d 1159 certiorari granted 450 U.S. 1040, 101 S.Ct. 1756, 68 L.Ed.2d 237, (remanded for resentencing), therefore it comports with due process and equal protection requirements.

While it is true that as it appears 21 O.S.1981, § 701.9 does not enumerate specific mitigating circumstances as required by Gregg, supra, this is not grounds for reversal because in its instructions the trial court submitted eight such circumstances and further instructed that the jury need not confine its deliberations to them. They were allowed to consider any additional circumstance in mitigation which appeared from the evidence. No error occurred.

Appellant's sixteenth assignment of error is that 21 O.S. 1981, § 701.9 is unconstitutional because the State has failed to show that the death penalty fulfills a compelling State interest which cannot be gratified by less drastic means.

However, this rationale was not adopted by the Supreme Court in Gregg v. Georgia, supra:

Although we cannot invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology, . . . the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering. 428 U.S. 182, 183.

* * *

Therefore in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible as long as the penalty selected is not cruelly inhumane or disproportionate to the crime invoked. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Therefore this proposition is without merit.

For his seventeenth assignment of error appellant alleges that instruction number five unconstitutionally shifted the burden of proof to the defendant:

You are instructed that in the event you unanimously find that one or more of these aggravating circumstances existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death.

If you do not unanimously find beyond a reasonable doubt one or more of the statutory aggravating circumstances existed, then you would not be authorized to consider the penalty of death. In that event the sentence would be imprisonment for life.

If you do unanimously find one or more of these aggravating circumstances existed, then you would not be authorized to consider the penalty of death. In that event the sentence would be imprisonment for life.

If you do unanimously find one or more of these aggravating circumstances existed beyond a reasonable doubt and you further find that such aggravating circumstance or circumstances is outweighed by the finding of one or more mitigating circumstances the death penalty shall not be imposed. In that event the sentence would be imprisonment for life.

Similar instructions have passed constitutional muster. In Chaney v. State, supra, we held:

The jury was also instructed in accordance with Section 701.11 that the sentence would be life imprisonment if they found no aggravating circumstances or if mitigating circumstances outweighed the aggravating circumstances they found. We hold these instructions gave the jury sufficient guidance to prevent an arbitrary or discriminating application of the death penalty.

We find that the burden of proof was not shifted by these instructions.

For his eighteenth proposition of error appellant contends that the aggravating circumstance that the offense committed was especially heinous, atrocious and cruel is unconstitutionally vague and overbroad. We reject this contention and reaffirm our decision in Chaney, supra, that Instruction No. 8 gave the jury adequate guidance:

You are further instructed that the term 'heinous,' as that term is used in these instructions means extremely wicked or shockingly evil, and that 'atrocious' means outrageously wicked and vile; and 'cruel' means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others; pitiless."

For his nineteenth assignment of error appellant asserts that the evidence by the prosecution is insufficient as a matter of law to prove beyond a reasonable doubt the aggravating circumstance that the crime was especially heinous, atrocious, or cruel. He essentially argues that in order for the crime to fall within this category a substantial amount of physical or mental torture must precede the killing; which has been the general interpretation of the Florida court. State v. Dixon, 283 So.2d 1 (Fla. 1973). See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2950, 49 L.Ed.2d 913. However, in construing 21 O.S.Supp.1976 § 701.12(4), we are not bound only by the limitation that our interpretation not be open-ended. Gregg v. Georgia, supra. Accordingly we find that since appellant perpetrated a mass-murder by inflicting multiple gunshot wounds to his victims the jury was presented with sufficient evidence from which they could find the acts "atrocious" as defined in the instructions. No error occurred.

For his twentieth assignment of error appellant argues that the instructions of the trial court during the second stage of the trial proceedings were inadequate as a matter of law. Particularly arguing that the jury was not instructed properly under 21 O.S. Supp.1976, § 701.11 that they may refuse to impose the sentence of death after finding the presence of an aggravating circumstance which outweighs mitigating circumstances, appellant demands reversal. Appellant did not object at trial and offers no authority for his proposition. We find that the instruction's

fairly and accurately stated the applicable law. Batie v. State, 545 P.2d 797 (Okl.Cr.1976).

For his twenty-first assignment of error appellant argues that error occurred in an instruction which allowed the jury to consider all the facts and circumstances presented in the first stage of the proceedings in considering the correct punishment. However this contention is without merit in light of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) where the Court held

. . . we conclude that the Eighth and Fourteenth Amendments require that the sentence in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

In appellant's twenty-second proposition, appellant complains of Instruction No. 13 to the second stage of the proceedings:

You should not allow sympathy, sentiment or prejudice to affect you in reaching your decision, or any other arbitrary factor. You should avoid any influence of passion or prejudice when imposing sentence.

No. 6 You are not limited in your consideration to these minimum mitigating circumstances, if any you find from the evidence in this case. What are and what are not additional mitigating circumstances is for you the jury to determine.

The appellant specifically argues that Instruction No. 13 precluded the jury from considering as mitigating circumstances of character and prior record. We do not agree. When read with No. 6, the context of these instructions bound the jurors to confine their deliberation to objective analysis of the evidence presented and to dispense with any deep seated bias or arbitrariness. No error occurred.

For his twenty-third assignment of error appellant argues that the trial court improperly instructed the jury to unanimously return a verdict and select a verdict form in violation of 21 O.S. Supp.1981 § 701.11. Furthering his argument for reversal, it is argued that § 701.11 mandates the trial court to instruct the jury to render a life sentence if they cannot reasonably agree to a verdict; that the court would intervene if they could not agree.

Jury verdicts in Oklahoma criminal procedure must be unanimous. 22 O.S.1981, § 921, 922. When read in conjunction with 21 O.S.1981, § 701.11, it is clear that in a capital case (1) a verdict for the sentence of death must be unanimous and accompanied by an aggravating circumstance, (2) death will not be imposed if the jury unanimously finds that mitigating factors outweigh aggravating circumstances, (3) that a jury verdict recommending life imprisonment must be unanimous, (4) that if the jury cannot agree within a reasonable time the court shall dismiss the jury and record a life sentence.

As his final assignment of error appellant complains of Instruction No. 5 to the second stage of the proceedings. He argues that he is entitled to an instruction to the effect that if the jury may refuse to impose a sentence of death even if the aggravating circumstances outweigh the mitigating circumstances or if none exist.

We find that the trial court instructions correctly stated the law and particularly that language of the first paragraph "authorized to consider imposing a sentence of death" left the jury free to consider either life or death in a fair manner. Accordingly no error occurred.

Finally, as required by 21 O.S.1981, § 701.13(B) this Court makes the following findings with regard to sentences of death which have been imposed by the jury. Accordingly we find that: (1) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's finding of statutory aggravating circumstances as enumerated in 21 O.S.1981, § 701.12; (3) and the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases after considering both the crime and the defendant.

For the reasons herein stated, the judgment and sentence appealed from should be, and the same is hereby, AFFIRMED.

Judge Tom R. Cornish filed his recusement in this appeal and the Honorable Donald E. Powers, District Judge for the 23rd Judicial District was appointed to serve in his stead. Judge Powers authored this opinion.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA
THE HONORABLE DAVID M. COOK, DISTRICT JUDGE

CHARLES WILLIAM DAVIS, appellant, was convicted of Murder in the First Degree, in Oklahoma County District Court, Cases No. CRF-77-2905 and CRF-77-2906. He was sentenced to death and appeals.
AFFIRMED.

ROBERT A. RAVITZ
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Attorney for Appellant

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ASSISTANT ATTORNEY GENERAL
TOMILOU GENTRY LIDDELL
LEGAL INTERN
OKLAHOMA CITY, OKLAHOMA
Attorneys for Appellee

BUSSEY, P. J.: Concurs
BRETT, J.: Concurs in part and dissents in part

While I agree that the conviction for Murder in the First Degree should be affirmed, I cannot concur with the majority that the death sentence should be affirmed because I believe that Jurors Metivier and Musgrave were excused in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

When the court asked Juror Metivier the question ending, "...[A]re your reservations about the [d]eath [p]enalty?" She answered, "No."¹ A negative response to that question must be interpreted to mean, "No, my reservations are not such that I would not inflict the death penalty." However, the trial judge, attempting to clarify the confusing question, asked it more simply and she indicated that she would not inflict the death penalty.

At this point, Juror Metivier had given two answers in direct conflict. Then the defense attorney asked her if she was saying that she would automatically refuse to impose the death penalty, and she replied, "No, I'm not." The court repeated its second question, and her reply reflected her beliefs when she said,

¹Confusion apparently stems from the use by the court of a question couched in negative language.

"I just don't believe in taking one's life..." It did not reflect her willingness to consider death as a punishment.

The Supreme Court has held that a sentence of death cannot be upheld if potential jurors are excluded from the panel imposing that punishment on the basis of their personal beliefs about the death penalty. Witherspoon, supra. The only legitimate concern upon voir dire of the jury panel is whether they will consider the imposition of the death sentence, as one of the alternatives provided by state law, should the case be appropriate for that punishment.

With this in mind, the trial court's standard first question is not pertinent. The second question is confusing to read, and it must be even more confusing to hear. Given that, and Juror Metivier's response to the defense attorney's question, the excusal for cause of this juror was error.

I also believe that the majority's analysis of the voir dire of Juror Musgrave is clearly erroneous. First, Juror Musgrave indicated that she believed that she could agree to the death penalty without doing violence to her conscience. The court demanded a more positive answer and she said that she didn't believe she could agree to the death penalty without its having an effect on her conscience. Then the court asked her his standard, "Would your reservations prevent you from voting for the death penalty?" question. She said, "No," followed by, "No. I don't think I would." The defense attorney then asked if that meant she could possibly impose the death penalty in a particular case, and she said, "Yes. That is right." Finally, the court asked her his standard, "Could you agree to a verdict imposing the death penalty without doing violence to your conscience?" question, and she answered, "No."² As I have already said, whether it would do

²The crucial determination is whether the juror would conscientiously consider the death penalty as one of the punishment alternatives, not whether it would affect her conscience.

violence to her conscience is not the issue. This voir dire is replete with confusion, and the only two things that are clear are as follows: It would affect her conscience. And this would not prevent her from considering the death penalty under the appropriate circumstances.

The exclusion of Juror Musgrave was error.

For these reasons, I believe that the sentence should be modified to imprisonment for life.

APPENDIX B

Order of the Oklahoma Court of
Criminal Appeals Denying Petition for Rehearing

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

OF OKLAHOMA
JUN 20 1983

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES WILLIAM DAVIS,)
Petitioner,)
: F-78-140
-vs-) No. F-78-141
: THE STATE OF OKLAHOMA,)
: Respondent.)

Ross N. Lillard, Jr.
CLERK

ORDER DENYING PETITION FOR REHEARING
AND DIRECTING ISSUANCE OF MANDATE

NOW on this 17th day of June, 1983, after having examined the petitioner's petition for rehearing in the above styled and numbered cause, and being fully advised in the premises, this Court finds that it should be, and the same hereby is DENIED. The Clerk of this Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 17th day of June, 1983.

H. J. Bussey · PRESIDING JUDGE
DONALD E. POWERS, JUDGE

ATTEST:

Clerk

APPENDIX C

Petition for Rehearing in the
Oklahoma Court of Criminal Appeals

IN THE COURT OF CRIMINAL APPEALS OF THE
STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 31 1983
Ross N. Lillard, Jr.
CLERK

CHARLES WILLIAM DAVIS,)
Petitioner,)
-vs-)
THE STATE OF OKLAHOMA,)
Respondent.)

F-78-140
No. F-78-141

PETITION FOR REHEARING

The Petitioner, CHARLES WILLIAM DAVIS, respectfully requests this Court reconsider its opinion of May 9, 1983 and recall that opinion for the following reasons:

- 1) The Court's Opinion affirming the excusal of Jurors Musgrave and Metivier violated the defendant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and was improper in light of the Supreme Court's continued adherence to the standard of Witherspoon v. Illinois, 391 U.S. 510 (1968).
- 2) Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated by the Court's decision denying state funds to hire a psychiatrist to present mitigating factors on behalf of the defendant.
- 3) The Eighth and Fourteenth Amendments to the United States Constitution were violated by the prosecutorial misconduct during the sentencing stage of the trial proceedings.
- 4) The interpretation of the aggravating circumstance especially "heinous, atrocious or cruel" violates the defendant's due process rights under the Eighth and Fourteenth Amendment in light of the interpretation placed on "cruel, heinous and atrocious" by the Oklahoma Court of Criminal Appeals.

5) This Court should reconsider its holding that Oklahoma law allows for a mandatory imposition of the death penalty if aggravating circumstances outweigh mitigating circumstances or if no mitigating circumstances were found to exist.

6) The Eighth and Fourteenth Amendments requirement of proportionality review in capital cases requires modification of the instant case to life imprisonment.

7) The defendant was denied reliability in sentencing as is constitutionally required under the Eighth and Fourteenth Amendments to the United States Constitution by virtue of the cross examination of the Petitioner wherein the State elicited evidence of related parole violations.

Respectfully submitted,


ROBERT A. RAVITZ
First Assistant Public Defender

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing PETITION FOR REHEARING was served to the Attorney General in and for the State of Oklahoma this 31st day of May, 1983.


ROBERT A. RAVITZ

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES WILLIAM DAVIS,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

F-78-140
No. F-78-141

BRIEF IN SUPPORT OF PETITION FOR REHEARING

PROPOSITION I

THE COURT'S OPINION AFFIRMING THE EXCUSAL OF JURORS MUSGFAVE AND METIVIER VIOLATED THE DEFENDANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND WAS IMPROPER IN LIGHT OF THE SUPREME COURT'S CONTINUED ADHERENCE TO THE STANDARD OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

The Court's Opinion fails to consider the United States Supreme Court's continual concern that jurors be excluded only on the basis that they make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, and (2), that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, quoting Witherspoon v. Illinois, 391 U.S. 510, n. 21. Implicit in the reaffirmation of Witherspoon by the United States Supreme Court is the Court's concern that state appellate courts throughout the nation not condone Witherspoon violations so as to stop the ongoing stream of Witherspoon cases getting reversed in the federal courts.

This Court in addition to the affirmation of Petitioner Davis' death sentence, must be concerned with the precedential affect that an improper discussion of Witherspoon will have on state trial judges throughout the State of Oklahoma. If state trial judges continue to allow for the type of voir dire that went on in the instant case, Witherspoon error will run rampant through capital cases from Oklahoma, eventually going to the

federal courts. To condone Witherspoon error in the instant case will allow state trial judges to excuse jurors improperly and will prevent the state's legitimate right to exercise the decision of the people to have a constitutionally valid death penalty imposed where appropriate.

In Burns v. Estelle, 592 F.2d 1297, Judge Gee emphatically points out the fact that despite the court's feelings that a proper case for the death penalty has been shown, Witherspoon does not allow it. In Burns, Judge Gee states:

"Witherspoon v. Illinois and its progeny form the legal terrain of this difficult and distressing case. Its factual merits are not involved, so that mercifully we are spared recounting the pitiful details of the gross and brutal murder which the evidence amply shows this habeas petitioner committed. The only points before us concern the matter in which the jury then imposed his death penalty was constituted. Sufficient to say that if any crime merits such punishment, it is thoroughly deserved by Burns. Nevertheless, a faithful observance of the Supreme Court authority forbids its imposition here and it falls to us to say so."

Burns was affirmed by a unanimous Fifth Circuit en banc on rehearing in Burns v. Estelle, 626 F.2d 396 (1980) after the United States's decision in Adams, supra. A review of the voir dire in Burns as set out in the en banc opinion also written by Judge Gee, conclusively shows that the jurors excused in Burns were far less committed to considering the death penalty than those excused in the instant case for petitioner.

Similarly in Moore v. Estelle, 670 F.2d 56 (1982), a juror similar to the jurors in petitioner's case, was hesitant regarding her feelings about capital punishment. Near the end of her lengthy questioning, she summed up her position as "if you make me do it, I'll do it right." The court concluded her exclusion was improper.

In the instant case, the Court when faced with Juror Musgrave, was faced with a juror who stated that she could possibly impose a death penalty in some particular case but the court, requiring this juror to go further and give a definitive

positive answer, improperly excluded this juror. Similarly, Ms. Metivier never stated she was irrevocably committed to not considering the death penalty but only that she did not believe in taking ones life. These two jurors' excusal falls far short of the requirement of the United States Supreme Court in Witherspoon. To condone the excusal in this case will allow state trial judges to excuse people improperly and put in jeopardy every potential capital conviction the state obtains. This Court, in its decision in the instant case, has invoked the standard for approving Witherspoon error devoid of any rational basis under Witherspoon with the potential affect of nullifying constitutionally valid death penalty cases on improper questioning by state trial judges.

This Court should reconsider its decision upholding the propriety of the voir dire excusals in the instant case.

PROPOSITION II

PETITIONER'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S DECISION DENYING STATE FUNDS TO HIRE A PSYCHIATRIST TO PRESENT MITIGATING FACTORS ON BEHALF OF THE DEFENDANT.

To guard against the arbitrary and capricious infliction of the death penalty which caused a majority of the state's statutes on capital punishment to be voided by the United States Supreme Court decision in Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court in affirming the capital punishment statutes of Florida, Georgia and Texas in 1976, concluded that the separate sentencing hearings following conviction or adjudication of a capital offense which dealt with the character and record of the individual and the circumstances of the crime and authorizing the defense to bring before the jury whatever mitigating circumstances related to the individual defendant guaranteed that the constitutional infirmity found in the state statutes in Furman, supra had in fact been alleviated. See Graig v. Georgia, 428 U.S. 153,

Proffitt v. Florida, 428 U.S. 242 and Jurek v. Texas, 428 U.S. 262. Similarly, the United States Supreme Court has found that a capital punishment statute that has the effect of preventing a sentencer from considering all potentially mitigating factors reflected in a particular defendant's character and circumstances is constitutionally infirm, because it prevented the sentencer from considering any aspect of the defendant's character and record as independently mitigating factor. See Lockett v. Ohio, 438 U.S. 586 (1978). While the defendant in the instant case, was given an opportunity to present evidence in mitigation, the petitioner an indigent, was unable to produce the one evidence that in this type of case, a domestic killing involving a man who was twice the age of his wife and who loved his wife dearly as shown by the mitigating evidence, that is hiring a psychiatrist who could have testified to the emotional instability of the defendant and the true love and the reasons behind the killing. This denial was solely a result of the Oklahoma statutes that prohibit any type of funds for experts and prohibit any type of analysis by the state mental hospital regarding petitioner's condition except such condition to determine whether he is competent to aid and assist his attorney. See Generally 22 O.S. 1175.2. In the instant case, the Petitioner was denied his rights to effective assistance of counsel to effectively present a mitigational stage to equal protection and due process under both the Eighth and Fourteenth Amendment by this Court's continual approval of the standard which denies indigents the right to produce expert witnesses at the expense of the State where a showing has been made that it is necessary to attempt to save Petitioner's life. Petitioner contends that this procedure is constitutionally infirm and requests that this Court vacate its decision affirming the death penalty as far as petitioner is concerned.

PROPOSITION III

THE EIGHTH AND FOURTEENTH AMENDMENTS TO
THE UNITED STATES CONSTITUTION WERE
VIOLATED BY THE PROSECUTORIAL MISCONDUCT
DURING THE SENTENCING STAGE OF THE TRIAL
PROCEEDINGS.

This Court in apparent abandonment of the United States Supreme Court's holding in Gardner v. Florida, 430 U.S. 349 requiring reliability in capital cases has allowed a clearly improper and prejudicial closing argument on behalf of the prosecutor in Stage Two and condoned it on the grounds that there is no Oklahoma case law regarding second stage capital cases to support the Petitioner's contention that the argument violated established Oklahoma law. This particular part of the Court's Opinion is in contradiction of recent established Oklahoma capital cases regarding improper argument. Counsel initially contended that the comments regarding the ability of the jury to become angry was not improper. A thorough reading of this Court's decision in Hager v. State, 612 P.2d 1369 (Okl.Cr. 1980) tells otherwise. In Hager, this Court held that arguments based on juror's emotions are improper in the second stage of a capital case, the same argument made by the prosecutor in the Hager case appealing to the emotions of the jury was the product of a reversal in Hager. This Court cannot, in its opinion state that this particular argument is proper in light of this Court's decision in Hager, *supra*.

Similarly, a majority of this Court in their specially concurring opinion in Jones v. State, 660 P.2d 634 (Okl.Cr. 1983) admonished the prosecutors that it was improper to place the jurors in the posture of community watchdog. In the instant case this too was done. The prosecutor's comments dealt with the community's need to stop these type of crimes the defendant cannot continue to act with impunity that a life sentence was tried and was not punitive and didn't work and his comments regarding the need to look into the future and see that in four or five years, the defendant had killed somebody else. Further, comments under the deterrent effect of the

death penalty have also been held to be improper by this Court in the capital case of Hager, supra. Recently, the Eleventh Circuit in Hance v. Zant, 696 F.2d 940 (11th Cir. 1983) held a prosecutor violated the Eighth and Fourteenth Amendments by arguing that prisoners would not be safe with petitioner in prison and that he might escape; that he, the D.A., would sleep better with Hance dead; and that a vote for death was the jurors' part in the battle against crime. The Court stating:

"this dramatic appeal to gut emotion has no place in the courtroom, especially in a case involving a penalty of death."

This Court cannot in following Oklahoma precedent, overrule the decision in Jones and Hager and expect to have an appellate court determine that the Oklahoma Court of Criminal Appeals is attempting to look at Oklahoma capital cases and apply a meaningful basis from distinguishing those cases in which the death penalty was imposed and those cases in which it was not. See Generally Goddfrey v. Georgia, 446 U.S. 420 (1980). The prejudicial argument in this case goes contrary to well established law in capital cases in the State of Oklahoma. This Court should reconsider its holding and modify the defendant's sentence to life imprisonment.

PROPOSITION IV

THE INTERPRETATION OF THE AGGRAVATING CIRCUMSTANCE ESPECIALLY "HEINOS, ATROCIOUS OR CRUEL" VIOLATES THE DEFENDANT'S DUE PROCESS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT IN LIGHT OF THE INTERPRETATION PLACED ON "CRUEL, HEINOS AND ATROCIOUS" BY THE OKLAHOMA COURT OF CRIMINAL APPEALS.

In Godfrey v. Georgia, 446 U.S. 420 (1980), the United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution prohibited an appellate court from adopting a broad and vague construction of an aggravating circumstance. The Court in Godfrey concluded that petitioner's crimes cannot be said to have inflicted a consciousness materially more depraved than any person guilty of murder. In the instant case, this Court concluded that the petitioner perpetrated a "mass murder" by inflicting multiple wounds on his victims, was sufficient to come up with the aggravating circumstance "cruel, heinous, and atrocious" as defined by the Oklahoma Court of Criminal Appeals in Chaney v. State, supra.

To categorize this crime as a mass murder and that therefore said mass murder renders an offense "cruel, heinous and atrocious" is to obviously categorize this aggravating circumstance vague and overbroad under the Eighth and Fourteenth Amendments to the United States Constitution. The instant case involved a domestic dispute wherein the defendant was at home when the people came to his home. If this Court holds that "cruel, heinous and atrocious" applies to a mass murder, obviously this is not the type of case to fall within the category. What we are referring to under those types of cases is a situation where numerous people are killed in a planned, intended design to kill these people and not a spur of the moment killing which though it amounts to malice aforethought, cannot be said to be more depraved than the average killing of an individual.

In the instant case we don't have what we would have where six people are simultaneously executed in a meat locker wherein

this Court could legitimately categorize the actions as a mass murder but a domestic situation where the defendant may have created a great risk of death to more than one person but certainly his actions cannot be said to be more depraved than the standard killing. This application in the instant case, violates the United States Supreme Court's clear mandate in Godfrey v. Georgia, supra, that the petitioner's crime reflect a consciousness materially more depraved than any person guilty of murder. For said reasons, Petitioner requests this Court to reconsider its finding that this particular proposition is cruel, heinous and atrocious and modify Petitioner's sentence to life imprisonment.

PROPOSITION V

THIS COURT SHOULD RECONSIDER ITS HOLDING THAT OKLAHOMA LAW ALLOWS FOR A MANDATORY IMPOSITION OF THE DEATH PENALTY IF AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING CIRCUMSTANCES OR IF NO MITIGATING CIRCUMSTANCES WERE FOUND TO EXIST.

This Court has continually refused to address the issue which it seemed to conclude in Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980), that if the aggravating circumstances outweigh mitigating circumstances, death is mandatory. In Proposition XX, counsel again argued that the court erred in failing to give a jury instruction which stated that if the aggravating circumstance or circumstances do not outweigh the finding of one or more mitigating circumstances, the jury may still decline to impose the sentence of death and sentence the defendant to life in prison. The Court stating that the instructions contained the appropriate law and that therefore there was not error to fail to instruct like this. Counsel calls the Court's attention to the recent denials of certiorari in Smith v. North Carolina; Williams v. North Carolina; Pinch v. North Carolina, 103 S.Ct. 474 wherein Justice Stevens, respecting the denial of certiorari in these three North

Carolina cases states: "In each of these three capital cases, the trial judge instructed the jury that it had the duty to impose the death penalty if it found that one or more aggravating circumstances existed, that the aggravating circumstances were sufficiently substantial to call for the death penalty and that the aggravating circumstances outweighed the mitigating circumstances." Justice Stevens contended that these instructions raised an ambiguity which raised a serious question regarding compliance with the Court's holding in Lockett v. Ohio, 438 U.S. 586. Justice Stevens contended that a mandatory death penalty where mitigating circumstances did not outweigh aggravating circumstances may violate Lockett because the death penalty would be imposed in spite of factors which may call for the less severe penalty.

Similarly, in King v. Mississippi, No. 0 82-6106, 33 Cr. L. 4039, Justice Marshall would grant certiorari "to decide the constitutionality of instructing a jury that it must sentence a defendant to death if it finds that the prosecution has proved aggravating circumstances that outweigh mitigating circumstances. There is a substantial question whether such an instruction impermissibly prevents the jury from basing its sentence on 'factors which may call for a less severe penalty,' Lockett v. Ohio, 438 U.S. 586, 605 (1978), even though they do not outweigh the aggravating circumstances proven by the prosecution. Cf. Woodson v. North Carolina, 428 U.S. 280 (1976)."

It was entirely possible that the jury in the instant case, concluded that the aggravating circumstances outweighed the mitigating circumstances and were thus, based on the court's instructions required to give the death penalty. Had the jury been properly instructed that they may still decline to impose the death penalty if they feel the totality of the circumstances justified life imprisonment, the jury more than likely could have concluded that the death penalty was inappropriate in this case since it involved a 57 year old man

in the commission of a domestic dispute. This court should therefore modify this sentence to life imprisonment.

PROPOSITION VI

THE EIGHTH AND FOURTEENTH AMENDMENTS
REQUIREMENT OF PROPORTIONALITY REVIEW IN
CAPITAL CASES REQUIRES MODIFICATION OF
THE INSTANT CASE TO LIFE IMPRISONMENT.

This Court concluded in its findings that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases after considering both the crime and the defendant. This Court has continually closely scrutinized capital cases to determine whether the death sentence was arbitrary and capricious considering the facts of the case. This Court in Burrows v. State, 640 P.2d 533 (Okl.Cr. 1982), concluded that the death penalty imposed during a heat of passion, domestic killing while amounting to first degree murder, was not an appropriate case for the death penalty. (Opinion of Cornish, J. concurring in part and dissenting in part and Brett, presiding judge concurring in modification of defendant's sentence).

Similarly, a plurality of this Court has modified a sentence of death wherein the Court concluded the homicide was a most gruesome and sadistic murder remarkable in its atrocity and lack of provocation. See Munn v. State, 658 P.2d 482. There has been an almost universal refusal by juries and by appellate courts in Oklahoma to affirm the sentence of death wherein the killings arose during a domestic dispute. A close look at the cases cited by Judge Cornish in Munn v. State and the uniform lack of capital cases affirmed by this Court wherein the killing arose out of a domestic situation, demonstrates clearly that a comparison required by the Eighth and Fourteenth Amendments of proportionality review and by the Oklahoma statutes clearly require modification of Petitioner's sentence of life imprisonment.

PROPOSITION VII

THE DEFENDANT WAS DENIED RELIABILITY IN SENTENCING AS IS CONSTITUTIONALLY REQUIRED UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY VIPTUE OF THE CROSS EXAMINATION OF THE PETITIONER WHEREIN THE STATE ELICITED EVIDENCE OF RELATED PAROLE VIOLATIONS.

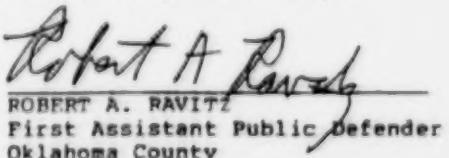
It is well established law in Oklahoma that comments on parole are improper in deciding guilt or innocence or punishment. See Evans v. State, 541 P.2d 269 (Okl.Cr. 1975) dealing with improper comments of prosecutor during closing argument. In the instant case, the comments elicited by the District Attorneys on cross-examination, in addition to being improper under Oklahoma law, violated the Eighth and Fourteenth Amendments requirement of reliability in sentencing as required by Gardner v. Florida, supra. It is highly likely that a jury, knowing about the parole system and the fact that people get out on parole and considering that in their verdict, defnied the defendant his rights to have his death sentence determined on the basis of aggravating and mitigating circumstances and not on factors which are irrelevant to the sentencing decision.

It is therefore respectfully requested that this Court reverse its holding and modify the Petitioner's sentence to life imprisonment.

CONCLUSION

For the foregoing reasons and in light of new cases interpreting capital punishment statutes by the United States Supreme Court and the federal courts and in light of numerous holdings from this Court regarding our death penalty statute and its concern for reliability in sentencing, this Court should recall its Opinion and modify the Petitioner's sentence to life.

Respectfully submitted,


ROBERT A. RAVITZ
First Assistant Public Defender
Oklahoma County

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing BRIEF IN SUPPORT OF PETITION FOR REHEARING was served to the Attorney General in and for the State of Oklahoma this 31st day of May, 1983.

Robert T. Landy

APPENDIX D

Voir Dire Examination of Jurors
Metivier and Musgrave as shown on the
Oklahoma Court of Criminal Appeals' Opinion

THE COURT: I ask you: In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. METIVIER: I have problems with that.

THE COURT: You what?

MS. METIVIER: I have problems with that.

THE COURT: You have problems with the Death Penalty? And I ask you a second question: If you found beyond a reasonable doubt that the Defendant was guilty of Murder in the First Degree, and if under the evidence and the facts and the circumstances of the case the law would permit you to consider a sentence of Death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

MS. METIVIER: No.

THE COURT: You would not inflict the Death Penalty in spite of the evidence, the law and the circumstances of the case? Do I understand you?

MS. METIVIER: Right.

MR. STUART: May I be allowed to ask an additional question?

THE COURT: Yes.

MR. STUART: Ms. Metivier, my question, and I am asking you, do I hear you right? Are you saying that you could never impose the Death Penalty in any case? You are not saying that under a proper case, that you couldn't consider imposing the Death Penalty?

MR. COATS: I object to the form of the question, Your Honor.

THE COURT: The form of the question is improper. It is sustained.

MR. STUART: Ms. Metivier, you are not saying you would automatically refuse to impose the Death Penalty in any case, are you?

MS. METIVIER: No, I'm not.

MR. STUART: That's all I have.

THE COURT: I ask you again. If you found beyond a reasonable doubt that this Defendant was guilty of Murder in the First Degree, and if under the evidence and facts and circumstances of this case, the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

The reason I repeat the question is because you answered that you would not under any circumstances

inflict the Death Penalty when I first asked the question. How do you answer the question now?

MS. METIVIER: I just don't believe in taking one's life. I'm not--You know, --

THE COURT: You are excused for cause.

MR. STUART: May I approach the bench?

THE COURT: Come to the bench.

The following proceedings were had out of the hearing of the jury).

MR. STUART: I am going to object to excusing this Juror for cause. I will move for a mistrial on the basis of this. This Juror answered my questions of: Would you automatically refuse to impose the Death Penalty? And she said No.

THE COURT: The objection is overruled.

THE COURT: In a case where the law and the evidence warrant, in a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. MUSGRAVE: I believe I could.

THE COURT: That is not a sufficient answer. I take that as being an answer tantamount to saying that you don't know. I will ask it again.

In a case where the law and the evidence warrant, that is a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty?

MS. MUSGRAVE: I don't believe I could.

THE COURT: You don't believe you could? If you found beyond a reasonable doubt that the Defendant in this case was guilty of Murder in the First Degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, are your reservations about the Death Penalty such that regardless of the law, the facts and the circumstances of the case, you would not inflict the Death Penalty?

MS. MUSGRAVE: No.

THE COURT: Ma'am?

MS. MUSGRAVE: No. I don't think I would.

THE COURT: You would not?

MS. MUSGRAVE: Huh-uh.

THE COURT: Is that a positive answer?

MS. MUSGRAVE: Yes, sir.

THE COURT: Or not?

MS. MUSGRAVE: Yes, sir.

MR. STUART: The same objection, Your Honor.

THE COURT: All right. The objection is overruled.

MR. STUART: May I be allowed to ask one question?

THE COURT: Yes, you may.

MR. STUART: Miss Musgrave, I believe I heard you say to that final question that you don't think you would. Now, that--Do I hear that to mean that you could possibly impose the Death Penalty in some particular case?

MS. MUSGRAVE: Yes. That is right.

MR. STUART: Yes, ma'am. That's all I have.

THE COURT: Well, I ask again. In this case if the law and the evidence warrant, in a proper case, if this is a proper case, could you, without doing violence to your conscience, agree to a verdict imposing the Death Penalty? I cannot accept anything short of a positive response to that question, Miss Musgrave. Yes or no?

MS. MUSGRAVE: No. I would say no.

THE COURT: All right. Anything further?

MR. STUART: Yes, sir. May I approach the bench?

THE COURT: Yes.

(The following proceedings were had out of the hearing of the jury).

MR. STUART: At this time, we move for a mistrial, and we would object to any excusing of Mrs. Musgrave for cause as on this second question she said, "I think I could." She told me she could in a proper--She didn't say she couldn't in any case, and that is what Witherspoon is directed at, and we strenuously object to excusing this Juror.

MR. COATS: I would say Counsel's questions were so leading that she would answer it--She has fairly answered the Judge's questions set out by the Court which is proper, and we move to have her excused.

MR. STUART: May I further say on the record that I think the Judge's question regarding this particular case is not the proper question. A proper case is to be determined by the Jury. This case is not in point now. They can't properly even consider it. The proper question is whether or not they could consider imposing the Death Penalty in some case or a proper case. Not this particular case.

THE COURT: The Defendant's objection is overruled. The Juror will be excused for cause.

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AUG 1 1983

CASE NO. 83 5183

OFFICE OF THE CLERK
SUPREME COURT U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES WILLIAM DAVIS, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF
CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, CHARLES WILLIAM DAVIS, moves that the Court grant leave for him to proceed in forma pauperis. As grounds for this Motion, the Petitioner would state that he is currently confined in a penal institution and is unable to pay the fees and costs associated with seeking review of this Court. The factual grounds for this Motion are further detailed in the Affidavit of the Petitioner filed herewith.

For the reasons stated, the Petitioner requests that this Motion be granted.

Respectfully submitted,

Robert A. Pavitz

ROBERT A. PAVITZ
409 County Office Building
320 Robert S. Kerr
Oklahoma City, Oklahoma 73102
(405) 236-2727, ext. 582

COUNSEL FOR PETITIONER

IN THE SUPPME COURT OF THE UNITED STATES

CHARLES WILLIAM DAVIS, 1
Petitioner, 1
v.
1
STATE OF OKLAHOMA, 1
Respondent. 1

RECEIVED

AUG 1 1983

OFFICE OF THE CLERK
SUPREME COURT U.S.AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, CHARLES WILLIAM DAVIS, being first duly sworn, state that I am Petitioner in the above entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I was previously granted leave to proceed without costs, on grounds of poverty, during proceedings on this case in the Oklahoma Court of Criminal Appeals.

I further swear that the responses which I have made to the questions below relating to my ability to pay the cost of prosecuting the appeal are true:

1. Are you presently employed?

Answer: No, I am presently in the custody of the Oklahoma Department of Corrections, serving the sentence for which I am petitioning the Court for review. I have been imprisoned since MARCH 1978.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources?

Answer: No.

3. Do you own any cash or checking or savings account?

Answer: Yes, my institutional account currently contains \$0.00.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon you for support and state your relationship to these persons.

Answer: None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Charles W. Davis
CHARLES WILLIAM DAVIS

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG) SS:

Subscribed and sworn to before me on this 18 day
of July, 1987.

Ken Jeffries
Notary Public

My Commission Expires:

1-12-86